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No. 88-1507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ELAINE MOTT,

Petitioner,

v.

GERALD C. KERNS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

Respondents' self-serving reprise of testimony adduced and a verdict rendered in Dr. Mott's civil trial is wholly irrelevant. Mrs. Mott was not a party to that proceeding, was not called to testify, and has not yet had *her* case tried on the merits. Had Mrs. Mott been accorded her right to jury trial, she would have testified that Dr. Mott obeyed the traffic laws and had no open beer cans in the van and that her arrest and jailing was the

singularly most chilling and frightening night of her life. All that she asks is her day in court, to prove that armed state agents unconstitutionally searched and jailed her on the basis of her race, in a bailiwick where those agents circulate "runnin' nigger" firearms targets and other race-based hate paraphernalia.

II.

Respondents' recollection at page 9 of their brief concerning the first telephone contact between attorneys is, suffice it to say, greatly disputed. Elaine Mott's divorce attorney (John Bredell) had received no notice of the district court's October 2, 1986 status conference and learned about it only afterwards from Dr. Mott's attorney. Furthermore, respondents' assertion that petitioner did not appear for such status conference "on October 2, 1986 with Judge Hackett" (*id.* at 9), conceals the fact that Judge Hackett herself did not attend such conference. Rather, it was her law clerk who presided and fashioned an order, subsequently signed by Judge Hackett, which gave petitioner until October 6th, to have an attorney file an appearance. After petitioner's counsel timely filed his appearance and spent the next two months vigorously prosecuting petitioner's case, Judge Hackett dismissed for failure to prosecute based on conduct that allegedly occurred long prior to the court's most recent orders, which orders petitioner had obeyed. What instigated the dismissal was not petitioner's *failure* to prosecute but exactly the opposite—petitioner's new attorney's *eagerness* to prosecute.

III.

Respondents mislead the Court in asserting that Mrs. Mott "refused" to appear for scheduled depositions. (Brief in Opposition at 4-5.) In fact, as soon as Mrs. Mott resolved her difficulty with counsel occasioned by her bitter divorce, *respondents conducted a two-hour*

deposition of Elaine Mott on January 14, 1987, so that her purported "refusal" to appear is not a genuine issue. But moreover, Mrs. Mott explained at the district court hearing of September 14, 1987 that she was *not* told of the proposed deposition dates by her first attorney because Dr. Mott had not given their attorney her address. She and her husband were also subject to a mutual restraining order in the divorce case and she, not knowing the identity of the attorney her husband had hired to handle their civil rights case, was helpless to know of any attempts to depose her. Mrs. Mott was penniless, hiding from her abusive husband in Indiana. She testified that when she did learn indirectly from her husband, through a mutual friend, about a deposition scheduled in Michigan, near Dr. Mott's residence, she was too afraid of Dr. Mott to attend. (Elaine Mott Deposition at 97.) Mrs. Mott testified before the district court that she would have complied with every notice received from her attorney (Sept. 14, 1987 Transcript at 39) and would have subjected herself to a deposition, as indeed she later did:

> All I can say is I would have [willingly] gone for a deposition had Dr. Mott informed Mr. Hunt of our marital status and separation and had he told him to contact me. And if Mr. Hunt had knowledge of where I was located and would have sent me notice of a hearing for a deposition, I would have been there. [*Id.* at 66.]

This testimony was the basis for the district court's finding (Appendix at 6a), contradicted by its decision, that any neglect by Mrs. Mott was due to her bitter divorce.

IV.

More than two pages of respondents' brief is devoted to selectively quoting from a court paper filed by petitioner's attorney, in which petitioner allegedly "renunciated" the complaint. (Brief in Opposition at 10-12.)

Respondents ignore the fact that the paper they quote was *seeking to compel discovery in this case.* There could not have been a more concrete expression than this paper, of petitioner's intent to go forward with this case. The portions underscored by respondents merely state that petitioner had not been adequately represented to that point, not that she intended to "renunciate" this action.

In similarly contradictory fashion, respondents admit that the case was "essentially quiescent" for nearly one year, from August of 1985 to June of 1986, but then claim that the other parties conferred frequently during this time and that petitioner was remiss in not also conferring. (*Id.* at 8.) Respondents also aver that at the September 12, 1985 hearing on attorney Alan Hunt's motion to withdraw as counsel for Dr. and Mrs. Mott, Mrs. Mott's divorce attorney (John Bredell) did not indicate that he was representing Mrs. Mott's interests in this civil rights litigation (*id.* at 7), although that was the sole reason for his being there. Three sentences later, respondents acknowledge that "Mr. Bredell stated at the hearing that Mrs. Mott had an interest in proceeding with her civil claim against the Michigan State Police." (*Id.*)

V.

Respondents mistakenly suggest that Judge Hackett held an evidentiary hearing in which petitioner was accorded every process and consideration that was due her. (Brief in Opposition at 26.) To the contrary, Judge Hackett wholly failed to comply with the Sixth Circuit's order of August 6, 1987. (Appendix C at 10a-13a.) When petitioner appealed her first dismissal, the Court of Appeals for the Sixth Circuit ruled that Judge Hackett had violated petitioner's due process rights by dismissing without notice and an opportunity to be heard. (*Id.* at 13a.) Starkly in contrast with the argument presented by respondents, Judge Hackett's conduct

of the two hour hearing of September 14, 1987, only compounded the errors which had led to Elaine Mott's *sua sponte* dismissal on November 26, 1986, as shown by the following:

a. Judge Hackett convened the hearing pursuant to an "order to show cause" why Mrs. Mott should not be dismissed. Orders to show cause typically are issued when the party to whom the order is directed has egregiously offended, openly disobeyed, or already suffered a judgment in the issuing court. *See, e.g., Louisville & N. R. Co.* v *Schmidt*, 177 US 230 (1900) (execution of judgment proceeding); *Eureka Lake & Y. Canal Co.* v *Superior Court*, 116 US 410 (1886) (contempt proceeding);

b. Judge Hackett stated at the hearing's outset that she had been "instructed to review, if you will, [my] previous order denying plaintiff's participation in this lawsuit" (Sept. 14, 1987 Transcript at 3), when in fact the Court of Appeals for the Sixth Circuit had already reviewed her previous order, found it unconstitutional, and commanded fresh proceedings;

c. Mrs. Mott brought two attorneys to the hearing since one (John Bredell) would also be required to testify, but Judge Hackett pointedly said she would allow only one attorney to participate, thus forcing Mr. Bredell into the awkward position of being both lawyer and witness for Mrs. Mott (*id.* at 4);

d. Judge Hackett described the "problem I have with" Mrs. Mott's position (*id.* at 4) *even though Mrs. Mott had not yet been heard. See Marshall* v *Jerrico, Inc.*, 446 US 238, 242 (1980) (the Fifth Amendment ensures that a litigant "may present his [civil] case with the assurance that the arbiter is not predisposed to find against him");

e. Before hearing a word of testimony, Judge Hackett justified her previous (and unconstitutional)

order of dismissal by stating that "I spent a lot of time on this and I very slowly dismissed [Mrs. Mott] from the lawsuit, and did so clearly understanding" the circumstances (Sept. 14, 1987 Transcript at 7), even though Mrs. Mott was dismissed *sua sponte* and with no notice, a dismissal which was neither slow nor well informed. Judge Hackett concluded, "[s]o you may, you know, proceed as you wish. I'm willing to hear argument" (*id.*), a willingness evoked only by the Sixth Circuit's direct command;

f. At the outset, Judge Hackett made a "finding of fact on this record" that the respondents had been prejudiced by Mrs. Mott's inaction (*id.*), even though respondents did not utter one word at any point in the hearing to so indicate and never moved for dismissal themselves. In fact, respondents' only concern at the hearing was that they be given the chance to complete discovery once Mrs. Mott was permitted to proceed (*id.* at 111), as even respondents then recognized she was entitled to do;

g. Judge Hackett openly disclosed that the hearing was merely housekeeping to support a preordained outcome, by admitting that she needed "a sound record" (*id.* at 8) for an anticipated appeal, that she was proceeding only "as if" it was an evidentiary hearing (*id.* at 13), and that she intended to "stand on [her] original finding" (*id.* at 124) rather than find anew as the Sixth Circuit had commanded;

h. Judge Hackett improperly placed the burden of going forward (*id.* at 4) and the burden of proof (*id.* at 5) on Mrs. Mott, even though the hearing was ostensibly one in which respondents were seeking Mrs. Mott's dismissal;

i. Judge Hackett repeatedly admonished Mrs. Mott to respond to questions with short answers, even when Mrs. Mott was trying to understand the

question or complete an answer. (*Id.* at 33, 68, 70, 73, 87). After Judge Hackett cautioned Mrs. Mott's counsel not to ask leading questions, Judge Hackett opined that asking plaintiffs leading questions is "a problem in this kind of lawsuit" (*id.* at 24), an unfortunate inference that civil rights lawsuits are based on manufactured testimony; and

j. At the hearing's critical juncture, when Mr. Mott's counsel was articulating how Mrs. Mott had authorized the action from its outset, Judge Hackett limited the hearing "[j]ust to what this Court has and what it had before it when the case was dismissed" (*id.* at 56-7), thereby denying Mrs. Mott her hard-won right to a full hearing.

Judge Hackett then dismissed Mrs. Mott not because of any deliberately dilatory action such as existed in *Link* v *Wabash R. Co.*, 370 US 626 (1962) (the case heavily relied on by respondents)—in fact, Judge Hackett found in Mrs. Mott's bitter divorce good cause for any neglect (Appendix B at 6a)—but on a new standard, adopted in this case by the Court of Appeals for the Sixth Circuit in conflict with other circuits, that Mrs. Mott had not appeared sufficiently "active" and "interested" in the litigation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the decision of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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